

FEDERAL TRADE COMMISSION

16 CFR Part 4

Quorums

AGENCY: Federal Trade Commission

ACTION: Final rule.

SUMMARY: The Federal Trade Commission is amending section 4.14(b) of its Rules of Practice to provide that the number of Commissioners needed for a quorum will be a majority of those sitting and not recused in a matter.

EFFECTIVE DATE: This amendment is effective [insert date of publication in the FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

The Commission is revising Rule 4.14(b) of its rules of practice. The former rule defined a quorum as “a majority of the members of the Commission.” The revised rule defines a quorum as “[a] majority of the members of the Commission in office and not recused from participating in a matter (by virtue of 18 U.S.C. § 208 or otherwise).”¹ The amendment will allow the Commission to act in more situations than did its former rule.

While the Commission’s former rule reflected the “almost universally accepted common-

¹ Rule 4.14(c) continues to require, for Commission action, “the affirmative concurrence of a majority of the participating Commissioners, except where a greater majority is required by statute or rule or where the action is taken pursuant to a valid delegation of authority.”

law rule” respecting quorums, *FTC v. Flotill Products, Inc.*, 389 U.S. 179, 183-84 (1967), that common-law rule (or, more precisely, the common-law rule that applies in the absence of an express statutory provision), does not prevent the adoption of a different quorum rule. *Falcon Trading Group, Ltd. v. SEC*, 102 F.3d 579, 582 (D.C. Cir. 1996). The FTC’s new rule, like its predecessor, protects against “totally unrepresentative action in the name of the body by an unduly small number of persons.”² Further, in reducing quorum numbers by virtue of recusals as well as vacancies, the FTC is following the approach taken by the SEC in 1995.³

The Administrative Procedure Act does not require prior public notice and comment on this amendment because it relates solely to a rule of agency organization, procedure or practice. 5 U.S.C. 553(b)(A). For this reason, the Regulatory Flexibility Act also does not require an

² See Robert’s Rules of Order (10th Ed.) § 3, p. 20 (2001) (discussing purpose of a quorum rule); *Assure Competitive Transportation v. United States*, 629 F.2d 467 (7th Cir. 1980), *cert. denied*, 429 U.S. 1124 (1981) (quoting Robert’s Rules). We understand this to mean that the rule protects against totally unrepresentative actions in the name of the Commissioners able to participate in a matter. This does not necessarily mean that the participating Commissioners would reach the same result that the full complement of sitting Commissioners would have reached if they were all able to participate. But, if that were the test, any quorum rule would fail unless it required that every member of the body participated in every action taken by the body. The FTC’s revised rule, like its former rule, also enables Commissioners who oppose an agency action to try to change the minds of their colleagues who are inclined to support it.

³ The SEC’s rule, while it would not find a quorum in every situation where the FTC’s new rule would, does provide for quorum size to be reduced by recusals. That rule provides,

A quorum . . . shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office; and provided further that on any matter of business as to which the number of members in office, minus the number of members who either have disqualified themselves from consideration of such matter pursuant to § 200.60 or are otherwise disqualified from such consideration, is two, two members shall constitute a quorum for purposes of such matter.

17 CFR 200.41. See also *Falcon Trading Group, supra* (upholding rule, in a matter decided by two Commissioners when the SEC’s other three seats were vacant, as an exercise of the SEC’s general rulemaking authority). Cf. *SEC v. Feminella*, 947 F. Supp. 722, 725-27 (S.D.N.Y. 1996) (also upholding the rule, but treating it as a delegation).

initial or final regulatory flexibility analysis. See 5 U.S.C. 603, 604. The revision does not involve the collection of information subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in CFR Part 4

Administrative practice and procedure, Freedom of Information Act, Privacy Act, Sunshine Act.

For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, Chapter 1, Subchapter A, of the Code of Federal Regulations, as follows:

PART 4 - MISCELLANEOUS RULES

1. The authority citation for Part 4 continues to read as follows:

Authority: 15 U.S.C. 46, unless otherwise noted.

2. Revise § 4.14(b) to read as follows:

§ 4.14. Conduct of business.

* * * * *

- (b) A majority of the members of the Commission in office and not recused from participating in a matter (by virtue of 18 U.S.C. § 208 or otherwise) constitutes a quorum for the transaction of business in that matter.

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By direction of the Commission.

Donald S. Clark
Secretary